

48A C.J.S. Judges § 9

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

I. In General

A. Definitions and Distinctions

2. Judge

§ 9. Judges de facto

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West's Key Number Digest

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A judge de facto is a judge operating under color of law, color of title, or color of authority but whose authority suffers from a procedural defect or irregularity.

A "de facto judge" is a judge operating under color of law,¹ color of title,² or color of authority,³ such as an appointment⁴ or election,⁵ but whose authority suffers from a procedural defect or irregularity⁶ that is unknown to the public.⁷

A judge may be considered a de facto official even if all of the legal requirements for holding the office have not been met,⁸ such as the timely filing of the oath of office.⁹ A judge who holds over after his or her term has expired¹⁰ or a judge who remains on the bench after having reached retirement age¹¹ may be a de facto judge. A judge temporarily assigned to another court is also a de facto judge¹² as is a retired judge sitting by designation.¹³

A de facto judge has all the power and authority of a proper de jure judge,¹⁴ but he or she may be ousted by a direct proceeding.¹⁵

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Footnotes

- 1 Minn.—*State v. Irby*, 820 N.W.2d 30 (Minn. Ct. App. 2012), review granted, (Nov. 20, 2012).

Tex.—*Orix Capital Markets, LLC v. American Realty Trust, Inc.*, 356 S.W.3d 748 (Tex. App. Dallas 2011), review denied, (Dec. 14, 2012).

Lawful authority
Utah—*Pett v. Brigham City Corp.*, 2010 UT App 394, 246 P.3d 758 (Utah Ct. App. 2010).
- 2 Tex.—*Orix Capital Markets, LLC v. American Realty Trust, Inc.*, 356 S.W.3d 748 (Tex. App. Dallas 2011), review denied, (Dec. 14, 2012).
- 3 Fla.—*Pierre v. State*, 821 So. 2d 1174 (Fla. 3d DCA 2002).
- 4 Ariz.—*In re Estate of de Escandon*, 215 Ariz. 247, 159 P.3d 557 (Ct. App. Div. 1 2007).

Wash.—*City of Spokane v. Rothwell*, 141 Wash. App. 680, 170 P.3d 1205 (Div. 3 2007), rev'd on other grounds, 166 Wash. 2d 872, 215 P.3d 162 (2009).
- 5 Wash.—*City of Spokane v. Rothwell*, 141 Wash. App. 680, 170 P.3d 1205 (Div. 3 2007), rev'd on other grounds, 166 Wash. 2d 872, 215 P.3d 162 (2009).
- 6 Fla.—*Pierre v. State*, 821 So. 2d 1174 (Fla. 3d DCA 2002).

Ariz.—*In re Estate of de Escandon*, 215 Ariz. 247, 159 P.3d 557 (Ct. App. Div. 1 2007).

Minn.—*State v. Irby*, 820 N.W.2d 30 (Minn. Ct. App. 2012), review granted, (Nov. 20, 2012).

Wash.—*City of Spokane v. Rothwell*, 141 Wash. App. 680, 170 P.3d 1205 (Div. 3 2007), rev'd on other grounds, 166 Wash. 2d 872, 215 P.3d 162 (2009).
- 7 Ariz.—*In re Estate of de Escandon*, 215 Ariz. 247, 159 P.3d 557 (Ct. App. Div. 1 2007).
- 8 Tex.—*Orix Capital Markets, LLC v. American Realty Trust, Inc.*, 356 S.W.3d 748 (Tex. App. Dallas 2011), review denied, (Dec. 14, 2012).
- 9 Ariz.—*State v. Checchi*, 2008 WL 4606549 (Ariz. Ct. App. Div. 2 2008); *In re Estate of de Escandon*, 215 Ariz. 247, 159 P.3d 557 (Ct. App. Div. 1 2007).

Colo.—*People v. Stanley*, 170 P.3d 782 (Colo. App. 2007).

As to the requirement of an oath of office, generally, see § 48.
- 10 Neb.—*State v. Birdwell*, 188 Neb. 116, 195 N.W.2d 502 (1972).

As to the right or duty of a judge to hold over after his or her term has expired, see § 60.

- 11 Fla.—*State ex rel. Booth v. Byington*, 168 So. 2d 164 (Fla. 1st DCA 1964), judgment aff'd, 178 So. 2d 1 (Fla. 1965).
- As to the effect of judge reaching a set retirement age on his or her term of office, see §§ 64, 65.
- 12 U.S.—*Leary v. U.S.*, 268 F.2d 623 (9th Cir. 1959).
- Supernumerary judge**
- Ala.—*Bowling v. Pow*, 293 Ala. 178, 301 So. 2d 55 (1974).
- A.L.R. Library**
- Construction and Validity of State Provisions Governing Designation of Substitute, Pro Tempore, or Special Judge, 97 A.L.R.5th 537.
- 13 U.S.—*Two Guys from Harrison-Allentown, Inc. v. McGinley*, 266 F.2d 427 (3d Cir. 1959).
- 14 Ohio—*Evans v. Supreme Court of Ohio*, 119 Ohio Misc. 2d 34, 2002-Ohio-3518, 773 N.E.2d 621 (Ct. Cl. 2002), judgment aff'd, 2003-Ohio-959, 2003 WL 723228 (Ohio Ct. App. 10th Dist. Franklin County 2003).
- 15 § 22.